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IN THE
COURT OF APPEALS OF INDIANA

ANDREW McWHORTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A01-0701-CR-2
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Michael D. Peyton, Judge
Cause No. 33D01-0512-MR-1

August 9, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant, Andrew McWhorter (McWhorter), appeals his conviction for voluntary manslaughter, a Class A felony, Ind. Code § 35-42-1-3.

We affirm.

ISSUES

McWhorter raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion in admitting into evidence photographs of the victim that unduly prejudiced the right of McWhorter to a fair trial; and

(2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed voluntary manslaughter.

FACTS AND PROCEDURAL HISTORY

In December 2005, McWhorter, Amanda Deweese (Deweese), and their baby were living with Barbara Gibbs (Gibbs), McWhorter's grandmother. On December 2, 2005, inside Gibb's home, McWhorter shot Deweese in the head with a twelve-gauge shotgun at close range causing her death.

Earlier that night, both Deweese and McWhorter visited Janis Floyd's (Floyd) home. Floyd observed Deweese acting nervous and crying, and observed that McWhorter smelled of alcohol. Meanwhile, Gibbs attended a Christmas show, arriving home about 10:45 p.m. Shortly after she arrived home McWhorter and Deweese came home as well. The two argued. Just as Floyd observed, Gibbs could tell that McWhorter was intoxicated.

A few moments later, Deweese and Gibbs were sitting in the kitchen and McWhorter came in carrying a shotgun. He told Gibbs, "I'm going to show you how to use this gun[,] grandma, in case [you ever] need it." (Transcript p. 122). Gibbs told McWhorter to put the gun away. McWhorter placed the gun on the table and began loading and unloading it repeatedly. Eventually McWhorter took the gun out of the room.

Around this time, McWhorter confronted Deweese about her having intercourse with another man while she was pregnant with their baby. McWhorter asked for the return of the engagement ring that he had given Deweese. She took it off and handed it to him. He threw it on the floor and stepped on it. Gibbs picked the ring up, handed it to Deweese, and McWhorter asked for it again. Deweese gave it back and McWhorter threw it again, this time into a bedroom.

McWhorter went into the room where he had thrown the ring and stayed there for a while. During this time, Gibbs was sitting across the kitchen table from Deweese, facing her and McWhorter was standing behind Gibbs facing Deweese. Gibbs and Deweese were talking about whether McWhorter might try to kill himself. "[T]he next thing [Gibbs] knew, [she] heard a boom." (Tr. p. 126). Gibbs could see Deweese and quickly realized Deweese had been shot. Gibbs turned around and saw McWhorter standing close by. Gibbs asked what had happened and McWhorter said "oh no, oh no", and started screaming and carrying on. (Tr. p. 135). While Gibbs called 911, McWhorter said, "I didn't know there was a shell in it," and left the room. (Tr. p. 135).

Henry County Deputy Sheriff Ken Custer (Deputy Custer) was the first officer on the scene. He asked her what had happened and she stated that "[McWhorter] shot

[Deweese]." (Tr. p. 168). Supporting officers then arrived. The officers found McWhorter in the house lying behind a baby crib and a shotgun lying inside the crib. After McWhorter was taken into custody, he said on two occasions, "I shot her." (Tr. pp. 174-176).

On December 5, 2005, the State filed an Information charging McWhorter with murder, a felony, I.C. § 35-42-1-1(1). (Appellant's Appendix p. 111). In addition, the State sought to have McWhorter sentenced as a Habitual Offender under I.C. § 35-50-2-8 for two prior unrelated felony convictions. McWhorter was tried by a jury between July 31, 2006 and August 4, 2006. During the trial the State was permitted to enter into evidence certain autopsy photographs over the objection of McWhorter's counsel.

On August 3, 2006, the jury found McWhorter guilty of the lesser-included offense of voluntary manslaughter, a Class A felony, I.C. § 35-42-1-3. Thereafter, on August 4, 2006, the jury was presented with evidence of McWhorter's two prior unrelated felony convictions and determined that he was a Habitual Offender pursuant to I.C. § 35-50-2-8. On August 30, 2006, the trial court sentenced McWhorter to forty-five years for voluntary manslaughter, enhanced by thirty years as an Habitual Offender, for an aggregate sentence of seventy-five years.

McWhorter now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

McWhorter contends that the trial court erred in admitting into evidence certain photographs. Specifically, he contends that State's Exhibits 32 and 34-37 were

"gruesome photographs [which] served no purpose other than to inflame juror sensibilities," and caused him to receive an unfair trial. (Appellant's Br. p. 6).

Because the admission and exclusion of evidence, including the balance of probative value and prejudice, fall within the sound discretion of the trial court, we will review the admission of photographic evidence only for an abuse of discretion. *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Ketcham v. State*, 780 N.E.2d 1171, 1178 (Ind. Ct. App. 2003), *trans. denied*.

Generally, photographs depicting injuries of a victim or demonstrating the testimony of a witness are relevant and admissible. *Pruitt*, 834 N.E.2d at 117. "Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice." *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002) (citing Ind. Evidence Rule 403). Gory and revolting photographs may be admissible as long as they are relevant to some material issue or scenes that a witness could describe orally. *Corbett*, 764 N.E.2d at 627.

Beginning our analysis, we observe that State's Exhibit 32 is a photograph of two X-ray pictures of the victim's head. While it can be determined from the photograph that a large portion of the victim's skull has been destroyed, we would not characterize the photograph as gruesome or gory. Thus, we conclude there was little or no prejudice created by admitting the photograph. Accordingly, the trial court did not abuse its discretion by admitting State's Exhibit 32.

State's Exhibits 34 and 35 are both photographs of the head of the victim: State's Exhibit 34 shows the victim's face; and in State's Exhibit 35, the angle of the photograph displays the wound cavity. The photographs contain substantial amounts of blood and display a large gaping hole in the upper left-hand side of the victim's head. When considering the fact that other less gory photographs sufficiently display the placement and extent of the victim's injury, and that McWhorter had readily admitted to shooting the victim causing her death, we find the probative value of these photographs to be low. *See Corbett*, 764 N.E.2d at 628 (holding that admission of a photograph displaying the "hollow shell of the victim's body" was in error). Accordingly, we find the prejudicial effect of these photographs substantially outweighs their probative value. Thus, admission of State's Exhibits 34 and 35 was an abuse of discretion.

Moving on, State's Exhibit 36 shows Deweese's head in a manipulated state. Specifically, in State's Exhibit 36, blood has been cleaned from the wound, a towel is stuffed into her head to replace lost tissue, and an aid is holding her head together in attempt to "re-approximate the wound." (Tr. p. 243). The reason for, and result of, this manipulation was to permit Dr. Mellon—the pathologist who performed an autopsy on Deweese's body and testified at McWhorter's trial—to observe that the wound was caused by a shotgun fired within a few feet of the victim's head, determine the direction of the shot, and assist him in displaying to the jury the evidence which supports his findings.

Autopsy photographs often present a unique problem because the pathologist has manipulated the corpse in some way during the autopsy. *Corbett*, 764 N.E.2d at 627.

Autopsy photographs are generally inadmissible if they display the corpse in an altered condition. *Id*. However, there are some situations where some alteration of the body is necessary to demonstrate the testimony being given. *Ketcham*, 780 N.E.2d at 1179.

We find the alteration of the body depicted in State's Exhibit 36 was necessary to demonstrate the testimony being given by Dr. Mellon. The record supports that the photograph is highly probative in demonstrating the closeness of the weapon and angle of the shot; therefore, any prejudice that may have resulted from showing the photograph to the jury could not have substantially outweighed its probative value. *See Fentress v. State*, 702 N.E.2d 721, 722 (Ind. 1998) (finding photographs of victim's skull with hair and skin pulled away admissible because the pathologist had explained what he had done and that the alteration was necessary to determine the extent of the victim's injuries). We conclude there was no abuse of discretion by the trial court in admitting State's Exhibit 36.

State's Exhibit 37 shows the victim's midsection and hands, which have minor scrapes and abrasions. Dr. Mellon was unable to conclude what caused the minor scrapes and abrasions, and therefore the exhibit had low probative value. However, the photograph is not gruesome or gory, and consequently we conclude no prejudice resulted from showing this photograph to the jury. Thus, there was no abuse of discretion by the trial court in admitting State's Exhibit 37.

In summary, there was no error in admitting State's Exhibits 32 and 36-37, but there was error in admitting State's Exhibits 34 and 35. "Finding that the trial court erred in admitting some photographs is not enough to warrant reversal, however." *Corbett*, 764

N.E.2d at 628. An error in admitting evidence is harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial right of a party. *Custis v. State*, 793 N.E.2d 1200, 1226 (Ind. Ct. App. 2003); *see also* Ind. Trial Rule 61. In this case, our review of the record reveals substantial evidence in addition to these photographs. Thus, in light of the substantial evidence presented to the jury, we conclude that the impact of admitting State's Exhibits 34 and 35 was minor and the error was harmless.

II. *Sufficiency of the Evidence*

McWhorter also contends that the State failed to present sufficient evidence to sustain his conviction. Specifically, he contends that the State did not prove beyond a reasonable doubt that he acted "knowingly" or "intentionally" when he shot and killed Deweese.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Agilera v.* State, 862 N.E.2d 298, 306 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. A conviction may be based upon circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Abney v. State*, 822 N.E.2d 260, 264 (Ind. Ct. App. 2005).

The offense of voluntary manslaughter is defined by I.C. § 35-42-1-3, which states in pertinent part: "a person who knowingly or intentionally: (1) kills another human being . . . while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, it is a Class A felony if it is committed by means of a deadly weapon." I.C. § 35-41-2-2 defines the culpability requirement as follows: "(a) A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so. (b) A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."

Our review of the evidence presented to the jury and inferences therefrom most favorable to the verdict reveal several facts which support the conclusion that McWhorter acted knowingly or intentionally. In September of 2005, while living with a friend, McWhorter ranted and raved that he was going to kill Deweese. Gibbs testified that she saw McWhorter load and unload the gun repeatedly; thus, he knew how to use the weapon. In addition, evidence indicates McWhorter was upset with Deweese and acted irate within moments of shooting her, which supports the jury's finding that he was acting under sudden heat, an element of voluntary manslaughter. Further, McWhorter silently maneuvered to a position close to Deweese just prior to shooting her. Finally, McWhorter shot Deweese in the head with a shotgun, a highly effective place and method to ensure her death (*See Ketcham v. State*, 780 N.E.2d 1171, 1180 (Ind. Ct. App. 2003), *trans. denied* (holding that "the fact that the bullet went through [the victim's] heart makes it more likely than not that [the defendant] knowingly or intentionally rather than recklessly killed [the victim] when he fired his gun"). We hold this evidence, and

the inferences therefrom, constitute substantial evidence of probative value which supports the jury's finding that McWhorter acted "knowingly" or "intentionally" when killing Deweese.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court's admission of State's Exhibits 32 and 36-37 was not in error, and that the error in admitting State's Exhibits 34 and 35 was harmless, and (2) the State presented sufficient evidence to sustain McWhorter's conviction for voluntary manslaughter.

Affirmed.

NAJAM, J., and BARNES, J., concur.